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No. 80-1790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAKE CHARLES AMERICAN PRESS AND
WILLIAM HUGH SHEARMAN
Petitioners

v.

ROBERT M. MCHALE
Respondent

Petitioner's Brief in Reply to Brief of Respondent in Opposition To Petition For Certiorari

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COME NOW PETITIONERS, pursuant to Rule 24(4) of the Supreme Court Rules, to address arguments first raised in the Brief Of Respondent In Opposition To Petition For Certiorari received by Counsel for Petitioners on May 22, 1981.

ARGUMENT

A. *This Court's Scope of Review*

Respondent argues that the trial court's determination that the statement at issue was not opinion, and was made with actual malice, is a factual conclusion foreclosed from review by this Court. Yet because the actual malice standard, and the protection accorded "opinion" under *Gertz v. Welch,* 418 U.S. 323 (1974), *Greenbelt Pub. Association v. Bressler* 399 U.S. 6 (1970), and other decisions, are matters of constitutional law, there is no doubt that this Court may make an independent examination of the record "so as to assure . . . that the judgment does not constitute a forbidden intrusion on the field of free

expression." *New York Times Co. v. Sullivan,* 376 U.S. 256, 285 (1964).

Moreover, it is respectfully submitted that inasmuch as only statements which do not express pure opinion and which are therefore capable of being false may be defamatory, it is the plaintiff's burden to establish that an allegedly defamatory statement is factual, a burden which in this Court's examination of the record must be shown to have been met with "convincing clarity". See generally, Sack, *Libel, Slander and Related Problems* (P.L.I., 1980) 180.

B. ***Opinion Versus Fact***

In his Brief in Opposition, Respondent implies that Petitioners' request that this Court accord constitutional protection to the publication at issue as being a statement of opinion is somehow at odds with the testimony of Petitioner Shearman and/or the legal defenses asserted at trial. Brief in Opposition, at 15, 19. (hereinafter, "Br. Opp."). In response to this, it must first be noted that on September 22, 1978, Petitioners moved for Summary Judgment on the ground, *inter alia,* that the statement "No bond buyer would buy a nickel's worth of securities on McHale's opinion" constituted a non-defamatory expression of opinion. This constitutional defense was also raised before the Third Circuit Court of Appeals for the State of Louisiana.

As yet, Petitioners have not requested that the record of proceedings below be certified and transferred to the Clerk of this Court. Yet, the record will show that at trial, Charles King, a Judge of the Fourteenth Judicial District Court of Louisiana who was called to testify on Defendants' behalf, recognized the challenged statement for what it is—an opinion as to future events.

> "Q: You were aware of the fact, I take it, that Mr. McHale had issued many opinions in the sale of securities, that is, paving and sewerage certificates, and other types of securities, for the City of Lake Charles, were you not?
>
> A: Yes, I was.

Q: Would you, then, contradict the statement that 'No bond buyer would buy a nickel's worth of securities on McHale's opinion'? Would that be inaccurate if, in fact, this City has sold many securities under his opinion?

A: I don't know that I would contradict it, but I don't know that it would be accurate, either. It would be a conclusion or an opinion.

Q: All right, sir.

A: I don't know if a prospective bond buyer would or would not." Tr. at 814.

In short, Petitioners' published statement could not possibly have expressed "a thing that has [or has not] actually happened, . . . is [or is not] true." Br. Opp. at 13.[1]

Moreover, there was no persuasive evidence introduced at trial which would suggest that Petitioner Shearman—rather than making a poor choice of words to say what he intended—deliberately phrased his statement as he did merely to avoid potential liability for falsely stating that even securities issued with McHale serving as co-counsel on the approving legal opinion have not been sold.

Respondent argues that Publisher Shearman acknowledged that his statement was "a fact." Tr. at 14. Yet just as, for purposes of determining defamation liability, the statement "No bond buyer would buy . . . " cannot properly be isolated from its context within the editorial as a whole, *Greenbelt Pub. Ass'n. v. Bressler*, 398 U.S. 6, 13-14 (1970), *Scott v. McDonnell Douglas Corp.*, 112 Cal. Rptr. 609, 618, n. 11 (1974), so too is it inappropriate to divorce two answers given by Shearman under cross-examination from the essential thrust of his testimony.

On numerous occasions at trial, Shearman and editors for the American Press testified that the challenged statement was intended to refer to general obligation bonds, and to suggest that those bonds could not be sold on McHale's legal opinion

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[1] Similarly, the fact that one's opinion of future events may later prove to be inaccurate does not then transform that opinion into a misstatement of fact.

alone. Tr. at 873-74, 878-79, 992, 1031, 1041. The basis for believing this was that McHale rarely if ever prepared approving legal opinions on certificates of indebtedness without serving as co-counsel to other attorneys who specialized in bond work.[2] Tr. at 182, 233, 640-42, 741-43. Moreover, as McHale himself testified at trial, he had never been the sole attorney to issue an approving legal opinion on general obligation or revenue bonds. Tr. at 641-42, 644, 668-69.

Thus, it is respectfully submitted that Publisher Shearman's testimony that the intended meaning of the statement in question is a "fact," was simply his assertion at trial of the continuing accuracy and validity of his opinion, and does not constitute an admission that the opinion, if derogatory, is therefore defamatory.

C. *"Good Faith Belief" of Shearman*

Respondent argues that due to various "inconsistencies," "flagrant discrepancies and out and out lies of Mr. Shearman" at trial, Br. Opp. at 17, 19, the trial court was entitled to discount Mr. Shearman's testimony as to his honest belief in the correctness of his editorial, and as to his inadvertent failure to accurately express himself. One of these "inconsistencies" is Shearman's testimony at trial, contrary to his deposition testimony, that he did not in fact read paving certificate advertisements published in the American Press referring to approving legal opinions issued by McHale. This trial testimony was volunteered by Mr. Shearman, who explained that at the deposition, "I was being a smart aleck and I anticipated the question and I answered it wrong and I told you this before and I'll tell it to you again." Tr. at 1017.

Respondent offers this "inconsistency" as just further proof that Petitioner Shearman intended in 1977 to inflict harm on

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[2] One of these attorneys testified that simply because an attorney has issued the sole legal opinion approving what ultimately becomes a successful sale of paving or sewerage certificates does not mean that that attorney is sufficiently competent or reputable to generate the buyer confidence in his bond opinions necessary to successfully market general obligation bonds. Tr. at 178, 182.

Mr. McHale through falsehood, as he allegedly did in Petitioners' series of articles on the Sears Lease in 1974, articles which, incidentally, the trial court below found to be "First Amendment protected." Petition for Writ of Certiorari at 11a.

Another alleged inconsistency or lie is said to be found in Shearman's deposition testimony that he did not participate in the purchase by the Gulf National Bank Discount Committee of $350,000.00 in certificates of indebtedness issued on McHale's opinion. Respondent notes that the minutes of the relevant Committee meeting which were introduced into evidence at trial show that Shearman was in attendance when the Committee agreed that the bank should purchase said certificates. Further review of the trial transcript, however, makes it clear that when the suggestion was made to the Committee that the bank purchase those certificates, the Committee may not even have been told who the approving attorney was.

Respondent also hastens to point out that,

> "Faced with the truth at trial, Shearman never denied that he was aware that these certificates of indebtedness were purchased by his bank on Mr. McHale's opinion." Br. Opp. at 8.

Yet undersigned counsel's review of the trial transcript does not show that Shearman was ever asked to admit or deny his awareness of that fact.

Another purported inconsistency is alleged to exist between Shearman's August, 1977 deposition testimony and his 1979 trial testimony, pertaining to whether in 1974 he possessed three appraisals of the Sears lease entered into by McHale and various business associates. At deposition, Shearman said:

"A: No I don't have three of them [viz., appraisals].

Q: Did you have two?

A: No, sir.

Q: Just had one?

A: I don't even know where that is." Tr. at 1003-04.

At trial, Shearman said that in 1974 he "had" (received?; retained?) the three appraisals. Tr. at 1004. Of course, Shearman at trial went on to say "At that time I couldn't tell you where they were. ****I don't know that I had one, two or three at the time.**** As far as Mr. Pease's [appraisal] is, that could have been thrown away the day I got it." Tr. at 1005.

In any event, an impartial review of the trial transcript—including the deposition testimony introduced as evidence of prior inconsistent statements—does not reveal what Respondent alleges are "complete reversals of important aspects of sworn testimony", Br. Opp. at 17, which render inherently improbable Publisher Shearman's testimony that he did not publish with actual malice.

Of course, the central issue in this case is not discontinuities in trial testimony. Nor is the central issue one of semantics—i.e., fine linguistic distinctions between fact and opinion.[3] The fundamental issue is how far will the rights of free speech and of a free press in Louisiana extend in protecting harshly worded criticisms of public officials. Will those freedoms protect an editorial that acknowledges a public official's past performance of certain official functions, but goes on to express a qualitative viewpoint as to the merits thereof by stating that not one of a figurative group of citizens would value that official's performance.[4]

The fitness of Robert McHale for reappointment as City Attorney and, more specifically, whether the use of tax revenues

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[3] Dean Prosser once wrote that this distinction between fact and opinion "has proved to be a most unsatisfactory and unreliable one, difficult to draw in practice." *PROSSER ON TORTS* (3rd. ed. 1964) 814. Professor McCormick has said that the assumption that fact and opinion are readily distinguishable "is an illusion." *McCORMICK ON EVIDENCE* §11 at 23 (2nd ed. 1972).

[4] Obviously the fact that criticism of this sort may also disparage an official's private reputation, and thereby injure his or her private economic interests, does not strip the "citizen-critic of government" of his protection under *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) and *Greenbelt Pub. Ass'n v. Bressler*, 398 U.S. 6 (1970). See generally, *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

to retain McHale for Lake Charles' municipal securities work, which almost without exception has required the collaborative efforts of other attorneys, are matters which obviously pertain to local self-government and go to the heart of protected political discourse.

Respondent also objects to what he describes as Petitioners' "general attack on the Louisiana Judiciary" and "slurs of 'local prejudice'." Br. Opp. at 19, 20. Petitioners wish to assure this Court that they do not wish to slur or vilify the Louisiana Judiciary generally or the trial court below. Petitioners merely wish to present for the record their alarm at the increasing frequency with which newspapers seeking to perform their constitutional role as best they know how are suffering judgments of enormous sums which would seem not to reflect a trial court's or jury's realistic assessment of culpability and reputational injury, but rather retaliation for unpopular viewpoints and aggressive reporting.

And query, might the verdict below also be characterized as punitive, giving insufficient latitude to dissident critics of the local political establishment in Lake Charles?

Will this verdict dampen political debate in Lake Charles and elsewhere by compelling newspapers, public speakers, and other commentators in Louisiana to now evaluate a public official's performance or capabilities only in declarative and not emotional terms?

Are editors and publishers safe in permitting the publication of disparaging prose which purports to express the sentiments of other citizens, or just that which would express the attitudes of some other citizens, but not all or none? Is the colloquial use in "op-ed" commentaries of phrases such as "No one would . . . " now libelous if not literally accurate? Will the decision below permit "uninhibited, robust, and wide-open" "debate on public issues," *N.Y. Times, supra,* at 270, or merely allow pale, tame, qualified expressions of political preference?

Petitioners respectfully submit that the decision below shows an unrealistic lack of confidence in the ability of our

citizenry to recognize editorial opinion and, through exposure to conflicting ideas and the true facts concerning a public servant's performance, to draw their own conclusions. The decision below reflects a narrow and crabbed view of First Amendment freedoms, and should be reversed.

Respectfully submitted,

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